No. 73.

Brf. of Larner & Darlington for Appl't

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 285. 73

THE YOUNG WOMEN'S CHRISTIAN HOME,
APPELLANT,

Versus

JOHN L. FRENCH, Administrator, APPELLEE.

No. 286. 74

BARBARA FAUL et al., APPELLANT,

Versus

JOHN L. FRENCH, Administrator, APPELLEE.

BRIEF FOR APPELLANT YOUNG WOMEN'S CHRISTIAN HOME.

JOHN B. LARNER,
J. J. DARLINGTON,
Solicitors for the Young Women's Christian Home.

PRESS OF BYRON S. ADAMS.

9602

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These appeals present in this court, for the first time, the problem frequently referred to as "Lord Mansfield's Undecided Case." It is hoped that here, at last, a solution of that problem may be found upon principle, and which shall satisfy both the reason and the sense of justice of mankind.

Statement of Facts.

The case arises under the will of Mrs. Sophia Rhodes, bearing date May 10, 1894, set forth at pp. 19-20 of the Record, making the following disposition of her property:

1. One-half of the income of her estate to be paid over to her husband, Oliver Wheeler Rhodes, during his life.

2. All of her property, subject to the foregoing provision for the husband, to become absolutely the property of her son, Eugene Rhodes.

3. In the event of the death of the son before that of either the testatrix or her husband, certain pictures and paintings to be given to the Young Women's Christian Home, to be retained as ornaments of the Home as long as it should exist, the name of the testatrix as the donor to be connected with them during that time, and all the rest of her property to vest in a trustee in trust to pay the income to the husband during his life, and to pass to the Home absolutely upon his death; or, in the event of the testatrix becoming the survivor of both her husband and her son, all her property, of every description, to pass absolutely to the Home.

The will begins with the following announcement, disclosing, in terms, the purpose of the testatrix not to die intestate as to any portion of her estate: "I now dispose of the property and estate which it has pleased Almighty God to entrust to me, as follows."

The mother and son survived the husband, and both perished at sea, under the circumstances set forth at pp. 17–18 of the Record, leaving no evidence as to which of them was actually the survivor.

George W. Hulick and John B. Larner were appointed administrators with the will annexed of the estate of the testatrix, by the Supreme Court of the District of Columbia, and, at the conclusion of the administration, finding the sum of $14,891.99 in their hands for distribution, they filed their bill in that court, in the nature of a bill of interpleader, against the Young Women's Christian Home, claiming the fund under the will, against Barbara Faul and Andrew Wassner, claiming it as next of kin of Mrs. Rhodes, and against John L. French, administrator, claiming it as the representative of Eugene Rhodes, the son.

The case being submitted to the Supreme Court of the District of Columbia upon the agreed statement of facts set forth at pp. 15–18 of the Record, that court, in an opinion printed at pp. 26–31 of the Record, awarded the fund to the Young Women's Christian Home, holding, in brief, that there was no presumption of survivorship as between the mother and son, that the will manifested an anxious intent to guard against intestacy, under any contingencies whatsoever, and that the intention of the testatrix is clearly apparent that if her husband and son should not survive her so as to receive the property, or if it remained under her control at the time of her death, that it should go absolutely to the charity she had named, namely, the Young Women's Christian Home.

From this decision Barbara Faul and Andrew Wassner, next of kin of Mrs. Rhodes, and John L. French, administrator of Eugene Rhodes, appealed to the Court of Appeals of the District of Columbia, which court, concurring in the view that there was no presumption of survivorship as between the testatrix and her son, held, nevertheless, that the terms of the will "vesting the estate in Eugene Rhodes

Assignment of Errors.

The Court of Appeals erred,

1. In holding that the will of Mrs. Rhodes *prima facie* vested title in Eugene Rhodes.

2. In holding that the administrator of Eugene Rhodes is entitled to the estate unless it is shown affirmatively that the testatrix survived him.

3. In holding that the Supreme Court of the District of Columbia erred in the construction placed by it upon the will.

4. In refusing to hold, under the circumstances of the case, that the estate of Mrs. Rhodes is to be administered as though she were the survivor of her husband and son.

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From this decision Barbara Faul and Andrew Wassner, next of kin of Mrs. Rhodes, and John L. French, administrator of Eugene Rhodes, appealed to the Court of Appeals of the District of Columbia, which court, concurring in the view that there was no presumption of survivorship as between the testatrix and her son, held, nevertheless, that the terms of the will "vesting the estate in Eugene Rhodes immediately upon the testatrix's death, we agree that it raises a *prima facie* right in the personal representatives of the son, and imposes the burden upon her next of kin of displacing them by proof of his mother's survival."

From this decision the Young Women's Christian Home and Babara Faul and Andrew Wassner have taken the present appeals to this court.

I.

Insert Assignment of Errors

The Case for the Son's Administrator.

In both the Supreme Court and the Court of Appeals of the District of Columbia, the case of John L. French, administrator of Eugene Rhodes, rested upon the contention that the son, being the younger, the stronger and a good

swimmer, should be presumed to have survived, which proposition in each of the lower courts was supported by an exceedingly able brief and argument advocating the superiority of the doctrine of the civil law upon this question over that of the English common law. That, however, under the common law, facts of the character thus relied upon are insufficient to create any presumption upon which courts can act, is established by authorities from the earliest times and uniformly. The rule is variously stated, either that, in the absence of evidence to prove the fact, both parties will be presumed to have died at the same time, or that the course of distribution and descent will be the same as if the deaths had been simultaneous. Bradshaw *v.* Toumlin, 2 Dick, 633; Wright *v.* Samada, 2 Phill, 261; S. C., 2 Salk, 593; Satterthwaite *v.* Powell, 1 Curt, Ecc. Rep., 705; Durant *v.* Friend, 5 De G. & Sm., 343; Barnett *v.* Tugwell, 31 Beav. 232.

A celebrated case upon the subject is that of Underwood *v.* Wing, 19 Beav., 459, reported also under the title of Wing *v.* Angrave, 8 H. L. C., 183, in which case the Master of the Rolls, the Lord Chancellor and the House of Lords concurred in the conclusion that, under the common law, there could be no presumption of prior decease, in the absence of proof, although the husband was in good health, a very strong and powerful man and an able swimmer, while his wife was in delicate and weak condition, and their children of tender age; and this has ever since been the accepted conclusion in the English courts. *In re* Wainwright, Sw. & Tr., 257; *In re* Ewart, 1 Sw. & Tr., 258; *In re* Wheeler, 31 L. J., P. & M., 40.

In America, the uniform current of authority is to the same effect, a leading case being that growing out of the loss of Mrs. Ridgway, 69 years of age, her son-in-law, 45 years of age, and her grandchildren, aged 10 and 7 years,

respectively, out of which grew *In re* Ridgway, 4 Redf. 226; Stinde *v.* Goodrich, 3 Redf., 87; Newell *v.* Nichols, 12 Hun., 604; and Newell *v.* Nichols, 75 N. Y., 78, all holding that there is no presumption of prior decease in cases of this character without evidence tending to prove the fact. To the same effect are *In re* Hall, 9 Cent. L. J., 281; Johnson *v.* Merrithew, 80 Me., 111, 116; Cowen *v.* Rogers, 73 Md., 403; Ehle's Estate, 73 Wis., 445, 459–460; *In re* Wilbor, 20 R. I., 126.

This view was, in terms, adopted by both the Supreme Court and the Court of Appeals of the District of Columbia, nor can any English or American authority, it is believed, be found to the contrary. And, this being the uniform result of the authorities, both English and American, including as stated the decisions of both the lower courts in the case at bar, it would seem to be conclusive of the claim of French, administrator of Eugene Rhodes, except for what appears to be a wholly novel view taken by the Court of Appeals.

II.

The Decision of the Court of Appeals.

That learned court, having held, first, that the Young Women's Christian Home could not succeed to the fund under the circumstances which have happened, no matter how plain the intent of the testatrix, in the absence of evidence that she, literally, "became the survivor of both her husband and her son," and having further held that, "unlike the Roman law and the modern laws of some countries and States derived or adopted therefrom, the common law indulges no presumption of survivorship, whatever may have been the age, sex or physical condition of the respective persons proved to have lost their lives in a common disaster," and adopting as conclusive upon this

question Underwood *v.* Wing, 4 DeG., M. & G., 633, and Wing *v.* Angrave, 8 H. L. C., 83, concludes, nevertheless, that the terms of the will vested the estate in the son immediately upon the death of the testatrix, and that "it raises a *prima facie* right in the personal representatives of the son, and imposes the burden upon her next of kin of displacing them by proof of his mother's survival."

This conclusion is first attempted to be reasoned out by the learned court, through a supposed analogy between suits in ejectment and cases like the present. In ejectment it is stated, "the burden is upon the plaintiff to show not only his descent from some common ancestor to the person last legally seized, but also the extinction of all lines of descent that could take in preference," citing Posey *v.* Hanson, 10 App., D. C., 496, 505, and other cases. "And the rule seems to be substantially the same where the action is to recover or establish a claim to personal property," citing Schneider *v.* Pressner, 54 Ind., 524, 525, and other cases.

This analogy, it is respectfully submitted, fails in a most important particular. In ejectment, and in the analogous proceedings for the recovery of personal property, the defendant is in possession of the property, and is to be deprived of it by the plaintiff only upon terms of showing a superior right, the defendant being under no requirement or necessity of showing any title whatsoever in himself. In cases like the present, the property is in the possession of the court, all claims stand upon an equal footing, and only those who show the superior right can be entitled.

The Court of Appeals itself notes this want of analogy, and declares that, if there were no will, it would have great difficulty in determining whether or not under the Statute of Distributions there would be a *prima facie* right in the son requiring affirmative proof that the mother survived in order to displace those claiming under him; and it rests its

decision upon the proposition that, the existence of a will, giving the property to the son only in case he should survive the testatrix, goes further than the Statute of Distributions would do, and actually vests the title in the son, *prima facie*, notwithstanding the ~~established and~~ admitted legal principle that the property is to be administered as though neither had survived, but the two had died simultaneously.

That the learned court erred in the conclusion thus reached would seem to be unmistakably evident. There is no authority, precedent, or conceivable principle upon which a will can be claimed to have vested title in a legatee who did not survive his testatrix, but is to be taken as having died simultaneously with her.

Not only so, but the conclusion reached is in direct antagonism to the authorities cited by the opinion as having settled conclusively the law in cases of this kind.

Thus in Underwood *v.* Wing and in Wing *v.* Angrave, which the court declares to have finally set at rest whatever doubt may have existed upon the subject in question, the husband had left a will giving his property to the wife if she survived him, and the wife left a will giving her property, subject to certain interests in favor of her children, to her husband should he survive her. If these wills *prima facie* vested title in the beneficiaries, then the husband's property would have gone to the wife's heirs and next of kin, while the wife's property would have gone to the heirs and next of kin of the husband. The practical result arrived at and administered by the court, after eliminating the wills, however, was that each of the persons so perishing in the common disaster ~~were~~ was treated as the survivor, in so far as his or her property was concerned, the property of each going to his own heirs and next of kin.

And this has been the invariable rule, both in cases of intestacy, and where there was a will. The property, in all

the cases, has been held to descend or to be distributed as the property of him who was owner at the time of the disaster.

Thus, in cases of testacy, may be cited Taylor *v.* Diblock, 2 Phill., Eccl. Rep., 261, where a husband had made a will in favor of his wife, and both perished together, the property going to the husband's heirs; Mason *v.* Mason, 1 Meriv., 308, where a father left a will in favor of his son, both perishing together, and the property being distributed as that of the father; Goods of Murray, 1 Curt., Ecc. Rep., 596, which was a case of a will by a husband in favor of his wife, both perishing together in a common disaster; and see Doe dem. Knight, *v.* Nepean, 27 E. C. L., p. 45, in case of a will by a mistress in favor of a servant, both becoming the victims of a murder.

In cases of intestacy, see Johnson *v.* Merrithew, 80 Me., 116; Ehle's Estate, 73 Wisc., 459–460; Russell *v.* Hallett, 23 Kans., 196–7; Coye *v.* Leach, 8 Metc., 375; Schaub *v.* Griffin, 84 Md., 562, 566, in all of which cases the property was distributed as that of the owner at the time of the common disaster.

"The property remains where it is found to be vested"—that is, in the last-known owner—"unless there be evidence to show that it has been divested." Satterthwaite *v.* Powell, 1 Curt., Eccl. Rep., 705.

In the very recent case of *In re* Wilbor, 20 R. I., 126, Charlotte, Martha and Eliza Wilbor, three sisters, perished in the same calamity, no fact or circumstance appearing from which it could be inferred that either survived the other. Each left a will, devising all her real and personal estate, subject to certain legacies, "to her two sisters, or to either of the survivors, and to their heirs and assigns forever."

Under the theory or view adopted by the learned court below in this case, each of these wills would have raised "a

prima facie right in the personal representatives," and in the heirs, of the two sisters named in it, and the property of each would have devolved accordingly. The court, however, said: "As all three of the testatrices lost their lives in the same disaster, and no fact or circumstance appears from which it can be inferred that either survived the others, the question of survivorship must be regarded as unascertainable, and hence all rights of succession to their estates are to be determined as if death occurred to all at the same moment. Underwood *v.* Wing, 19 Beav., 549, 4 DeGex, M. & G., 633; Wing *v.* Angrave, 8 H. L. Cas., 183; Wallaston *v.* Berkely, L. R., 2 Div., 1, Ch. 213; *Re* Wainwright, 1 Sw. & Tr., 257; Scrutton *v.* Pattello, L. R 19 Eq., 369; Coye *v.* Leach, 8 Met., 371; Johnson *v.* Merithew, 80 Me., 111; Newell *v.* Nichols, 12 Hun., 604, 75 N. Y., 78; *Re* Rall, 9 Cent. L. J., 381; Russell *v.* Hallett, 23 Kans., 276; Ehle's Estate, 73 Wis., 455; 24 Am. & Eng. Encycl. L., 1027–1032. If all three of the testators are to be regarded as having died at the same moment, it follows that the bequest and devise in each of their wills to the two sisters or either of the survivors did not take effect, there being no interval of time as between the deaths of either during which titles to property could vest, and the wills, therefore, stand as if they contained only the bequests to the legatees subsequently named."

Upon the foregoing considerations and authorities, it is respectfully submitted, the Court of Appeals erred in holding that the will created a *prima facie* right in the son. And, if so, and if that court did not err in following the uniform current of English and American authority upon the propositon that, under the circumstances, there could be no presumption that the son survived the mother, it follows that, in no view of the case, can the administrator of the son be entitled to the fund.

III.

The only remaining question is, whether, under the terms of the will, and under the facts and circumstances of the case, the Young Women's Christian Home or the next of kin of Mrs. Rhodes have the superior right.

It is respectfully submitted that the decision of the Supreme Court of the District of Columbia should be reinstated, upon the grounds following, namely:

(*a*) That the intention of the testatrix, as plainly apparent from her will, not only amply justifies, but requires its re-instatement.

(*b*) That, as the rational and only rule upon the subject, deducible from all the authorities, the testatrix must be treated, *quoad* her own property, as the survivor, and her estate distributed accordingly.

(a)

The contention of the parties claiming through the testatrix herself is the technical one that her will should fail, because, technically, it gives her eastate to her son only in the event that he survived her, or to the Young Women's Christian Home only in the event that she survived him, neither of which events, as a matter of fact, can be certainly determined.

It is submitted, both upon principle and upon authority, that the cause should be decided upon a broader principle than that of a critical literalness in the application of the exact words employed, namely: upon the principle that a will is to be construed, not according to its letter, but according to its intent, and that mere verbal omissions, or strict literal criticisms or interpretations, are not to defeat the obvious wish of a testator, where the real intention is sufficiently plain.

The principle here urged, and the reasons for it, may be illustrated by what is believed to be the only case opposed to it, namely, that of Underwood *v.* Wing, reported finally in the House of Lords under the title of Wing *v.* Angrave, 8 H. L. Cas., 183.

In that case, Mr. Underwood and his wife, together with their three children, were lost at sea. He left a will devising and bequeathing all his estate to William Wing, in trust for his wife, if she survived him, and in trust for their children if the wife should first die; but, should the children die before attaining the age of twenty-one years and unmarried, then the whole estate to be the property of Mr. Wing. The wife, also, left a will, devising and bequeathing her property to Mr. Wing, for his sole use and benefit, in case her husband died in her lifetime, and subject to the children's interests.

Under these wills, both the husband and wife, together with their children, having died practically simultaneously, it was clearly the intent of both testators that their estate should pass to Mr. Wing; and this view of the matter was presented to the House of Lords by the Lord Chancellor, Campbell, in his dissenting opinion, with great clearness and force. See 8 H. L. Cas., 199. The case was decided, it is true, upon the narrower ground that, as Mr. Wing could not show either that the death of the husband occurred in the wife's lifetime, or that the wife's death occurred in the husband's lifetime, he could receive neither estate; and, as has been well commented upon the case, the result was that the courts were led "to make a new will for both the Underwoods, whereby they entirely set aside the family friend, whom both husband and wife had endeavored to honor, and to substitute in his place a person whom both had labored to exclude from participation in their estates."

In this result, it is believed, Underwood *v.* Wing has never

been followed by any other court. In instances of intestacy or cases of analogous nature, its conclusion that there is no presumption of survivorship, either from relationship, age, relative condition of health or the like, has been followed, almost uniformly; but we have found no other case in which the manifest intent of the testator has failed of effect through technical and literal adherence to the language of the will, without regard to its spirit and intent.

In Wing *v.* Angrave, Lord Campbell cites, in support of his dissenting view, the cases of Curius and Coponius, reported by Cicero, in which case a testator devised his estate to his supposed child *en ventre sa mére*, with remainder over if the child should die within age. The wife, as it turned out, never had been *enceinte*, and it was accordingly argued, as here, that the gift over was upon a condition, namely, the particular event of the child dying within age, which condition never happened; but the gift over was held valid on the ground that the intent should prevail, and that such stress should not be laid upon the mere words employed as to defeat the intent, instead of giving effect to it. And this view, under the same state of facts, seems to have been repeatedly maintained by the English courts: 2 Rop. Leg., 285, note 14, citing Jones *v.* Westcourt, Prec. in Ch., 316; S. P. Holcroft's case, Moor, 486; Bradford *v.* Fraley, 1 Doug., 63; Meadows *v.* Parry, 1 V. & B., 124.

It is claimed in the briefs on the other side that the doctrine of Underwood *v.* Wing has never been questioned, but has since been accepted by all courts as the undisputed doctrine governing in such cases. This claim is substantially true in so far as Underwood *v.* Wing repudiates the proposition that the fact of survivorship can be determined upon the speculative, uncertain and unsatisfactory conjectures to which age, sex, and physical conditions may give rise; but it is believed that no case can be found in which the case

has been recognized or followed in its subordination of the plain intent of the testator to the strict letter of the language employed in the instrument.

Of the cases cited in the opposing briefs, Russell *v.* Hallett, 23 Kans., 194; Johnson *v.* Merithew, 80 Me., 111; Cowman *v.* Rogers, 73 Md., 403; and Ehle's Estate, 73 Wisc., 445, are cases in which no question of the construction of wills was involved, there being no will in any of them except Ehle's Estate, and in that case the circumstances established the fact satisfactorily that the testator was the first to die.

The leading case subsequent to Underwood *v.* Wing, involving any similar question as to the construction of a will is that of Newell *v.* Nichols, 12 Hun., 604, affirmed in 75 N. Y., 78; and in that case the decision of both the lower and the appellate tribunal were contrary to that in Underwood *v.* Wing, and in entire harmony with the decision of the Supreme Court of the District of Columbia in the present case.

In that case, a wife had died leaving a husband, a son and a daughter. By her will, she created three funds—one of $30,000, the income of which was to go to the husband during his life, upon his death to the heirs of her body then living, and, in default of such heirs, to certain named remaindermen; another fund of $15,000, the income to go to the daughter for life, the principal at her death to be paid to the heirs of her body then living, in default of such heirs to her appointees by will, in default of appointment to the heirs of the body of the testatrix then living, and, in default of such heirs, then to the same ultimate remaindermen; while the third fund, also of $15,000, was settled upon the son as to the income, with the same provisions as to the principal at his death as are above stated with respect to the fund provided for the daughter. The father, son and

daughter were lost at sea, without evidence of survivorship between them.

It will be seen that, in this case of Newell *v.* Nichols, the title of the remaindermen to each of the three funds depended upon the contingency of survivorship. The $30,000 was to pass to them only in the event that, at the husband's death, there were no heirs of the body of the testatrix then living, which event did not happen unless the husband survived the two children; while as to the two fifteen thousand dollar funds, the remaindermen were entitled to neither unless, at the death of each of the two children, there was no heir of its body, no appointee by will and no heir of the body of the testatrix then living. The case was, therefore, precisely analogous to that of Underwood *v.* Wing, and, also, to the case now before the court.

The lower court (12 Hun.) held that the intention of the testatrix was clear that the property should go, in the first place, to her direct descendants, if there were any, and, if none, then to the remaindermen specified in the will; that those who claimed affirmatively the existence of heirs of the body of the testatrix at the respective deaths of the two children, must show such fact in order to defeat this intent, and that the remaindermen established their case when they proved the loss of the issue of the body of the testatrix by a common disaster, and without proof of survivorship.

And the Court cites Wright *v.* Samada (2 Salk., 593; S. C., 2 Phill., 261, note *c.*), Taylor *v.* Diplock, (2 Phill., 261), and Satterthwaite *v.* Powell (1 Curteis, 705), to the effect that the burden of proof is upon the next of kin who derive title through the survivorship of one out of several lost in a common calamity, to prove the fact—all of which cases, in effect, treat the owner of the property as the survivor, for all practical legal purposes.

These views were fully sustained by the Court of Appeals (75 N. Y., 78), holding that the intent of the will was that the limitation over to the remaindermen should be effectual if, for any reason, the children could not take; and that the death of the children without issue or appointment, under the circumstances, and in the absence of evidence of survivorship, established the title of the remaindermen, and entitled them to have the provisions of the will carried into effect.

It is true that both the Supreme Court of New York and the Court of Appeals of that State, in this case of Newell *v.* Nichols, endeavored to avoid expressly overruling Angrave *v.* Wing, by pointing out that, in the latter case, the gift over was upon a condition precedent, while in Newell *v.* Nichols the gift to the remaindermen was a conditional limitation; and this distinction is also adverted to in the opinion of the Court of Appeals in the case at bar. That the distinction, in so far as it exists, however, is wholly insufficient to account for the difference in result, or to reconcile the two cases, is abundantly apparent on the slightest consideration of the origin, object and effect of what are known as conditional limitations. At common law, remainders after estate upon condition were subject to the infirmity that, upon condition broken, only the heir could enter; so that, where the remainder was given to a third person, he was remediless if the heir refused to make entry. To remedy this evil, and for the accomplishment of no other object, "a distinction was introduced, in the case of wills, between a condition and a conditional limitation, and which has been supposed to partake more of refinement and subtlety than of solidity." 4 Kent's Commentaries, 127–8. This distinction was, that a remainder, as distinguished from a reversion, following an estate upon condition, should be construed to be, not a gift upon condition, but a conditional limitation. 2 Blackstone's Comm., 155.

But the distinction, quite apart from its just restriction to the object and purpose for which it was created and intended, cannot distinguish the result in Newell *v.* Nichols from that in Wing *v.* Angrave, for the reason that even a conditional limitation comprises both a condition and a limitation, the latter of which cannot take effect until the former has determined or defeated the precedent gift. "A conditional limitation is of a mixed nature, and partakes of a condition and of a limitation; as if an estate be limited to A for life, provided that when C returns from Rome it shall thenceforth remain to the use of B in fee; it partakes of the nature of a condition, inasmuch as it defeats the estate previously limited, and it is so far a limitation, and to be distinguished from a condition, that upon the contingency taking place the estate passes to the stranger without entry, contrary to the maxim of law that a stranger cannot take advantage of a condition broken." 4 Kent's Comm., 127–8. In other words, in the case of Newell *v.* Nichols, the gift to the Ridgway and Gunn heirs is a limitation, but one under which the estate passes to them, without entry, only upon the contingency taking place which determines the preceding gift. The death of the husband leaving no heirs of the body of the testatrix then living was a condition precedent to the fund of $30,000 passing to the Ridgway and Gunn heirs as remaindermen; and the death of the two children without heirs of their bodies, appointees by will or heirs of the body of the testatrix then living, was, in like manner, a condition precedent to the limitation becoming effective as to the two funds of $15,000 each.

"A conditional limitation is *a condition followed by a limitation over to the third person, in case the condition be not fulfilled or there be a breach of it.*" Bouvier's Law Dictionary, Tit., *Conditional Limitation.*

To adopt the analogy of actions in ejectment, and dropping from consideration as immaterial for present purposes the fact that the legal title was in trustees—immaterial, because it is elementary that equitable estates devolve in the same manner and subject to the same rules as do legal estates—would not the Ridgway and Gunn heirs have been compelled to prove, affirmatively, in support of any claim by them under the limitation, that the husband died without heirs of the body of the testatrix then living, and that the children of the testatrix died without issue or heirs of the testatrix surviving them? And, if so, how can the provisions under which they were to take be for present purposes distinguished, in any practical particular, from conditions precedent?

It is respectfully submitted that, of the grounds upon which the decision in Newell *v.* Nichols rests in the opinion of the court, the true ground is the following, from p. 622, 12 Hun.: "When a testator means to dispose of all his property, and uses the words 'If the legatee should not survive,' held to mean 'If the preceding legacy should from any cause fail.' Avelyn *v.* Ward, 1 Vesey, sr., 419; Rickman *v.* Morgan, 2 Brown's Chancery Cases, 396; Jones *v.* Westcombe, 1 Eq. Abbt., 245; Foster *v.* Cooke, 3 Brown's Ch., 347; Doo *v.* Brabant, 3 Bro. C. C., 397; Taylor *v.* Taylor, A. & R., 386; Jackson *ex dem.* Beach *v.* Durland, 2 Johns. Cas., 314."

If anything further were needed to show that the distinction between conditions precedent and limitations is insufficient to reconcile the difference in result between Newell *v.* Nichols and the case at bar in the Court of Appeals, it is furnished by the fact that, in Newell *v.* Nichols, as in the case at bar, the property before the court consisted entirely of personalty, as to which species of property the English law concurs with the civil in placing con-

ditions precedent and conditions subsequent upon the same footing. 2 Redf. on Wills, 286-7.

The principle here contended for, namely, that the intent of the testator is to be given effect, without regard to literal adherence to the language used where such literal adherence would defeat the testator's manifest desire, is laid down in all the text-books and authorities, and is illustrated by many decided cases.

As far back as the time of Lord Hobart and Lord Hale, it was declared that "the judges ought to be curious and *subtle* to invent reasons and means to make acts effectual according to the just intent of the parties." See Willes Reports, p. 682.

The intention is to be carried into effect, where apparent, although expressions must be discarded or modified to effectuate that purpose. Towns *v.* Wentworth, 11 M. P. C., 520.

And words will be supplied to that end. Abbott *v.* Middleton, 7 H. L. Cas., 68; S. C., 21 Beav. 143; Liston *v.* Jenkins, 2 W.Va., 62, and cases cited.

Where the intention of the testator is incorrectly expressed, the court will effectuate it by supplying the proper words. Cox *v.* Britt, 22 Ark., and cases cited.

In Chapman *v.* Brown, Burr., 1635, Lord Mansfield, having declared the object of construction to be "to attain the intent," added: "For this purpose, words of limitation shall operate as words of purchase; *implications shall supply verbal omissions;* the letter shall give way; every inaccuracy of grammar, every impropriety of terms shall be corrected by the general meaning, if that be clear and manifest."

"It sometimes happens," says the Supreme Court of Pennsylvania in McKeehan *v.* Wilson, 53 Penn. St., 74, "that through the ignorance or mistake of the testator or

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drawer of a will, words are omitted or inserted which have left unexpressed, or wrongfully expressed, what clearly appears to have been the intention of the devisor from the whole tenor of the will, and which are necessary to carry it out. The rule in such cases is well settled that the courts will permit the will to be read as if the words omitted were inserted, and those wrongfully inserted omitted, and in the place or places where they were intended to have been inserted or omitted"; citing Redfield on Wills, 454, note 1; Jarman on Wills, 456, 414, cap. 17.

So, where there was a devise to a wife during life or widowhood, "but should she marry again, then," over, and she died without re-marriage, the court inserted the words, "or when she dies," so that the devise in remainder might take effect. Aulick *v.* Wallace, 12 Bush., 531, citing numerous authorities.

A very striking case is that of *In re* Redfern, 6 Ch. Div., 133. A father, having two sons and five daughters, gave each of the sons one-seventh of his estate absolutely. The remaining five-sevenths he gave to trustees upon trust to pay the income to his daughters, Elizabeth, Sarah, Eliza, Mary and Hannah, during their lives; and on the death of Elizabeth, one-seventh to the children of Elizabeth; on the death of Sarah, one-seventh to the children of Sarah; on the *death of Eliza, one-seventh to the children of Mary;* and, on the death of Hannah, one-seventh to the children of Hannah. The court said: "I am not to be deterred by an accidental ommission from putting the true signification on the will, and I am not to substitute what some blundering attorney's clerk or law stationer has written in this will, and treat that blunder as if it were the intention of the testator. I do not hesitate in the slightest degree, therefore, to adopt the rule which Vice-Chancellor Hale expressed in Sweeting *v.* Prideaux (2 Ch. Div., 413), that the testator must necessarily

have meant *what the mere letter of the will does not express.*" And, accordingly, "Mary," in the italicized clause above, was read "Eliza," and an entire new clause, similar in character, added for the children of Mary.

So, in Doe *dem.* Leach *v.* Micklem, 6 East, 486, the court supplied an unexpressed branch of an alternative omitted from a will, Lord Ellenborough saying: "This way of reading the will makes it intelligible and rational throughout, agrees with what, upon the whole, must, we think, have been the intent of the testator, and supplies a necessary, and what, in our opinion, is the only alternative."

See, also, Eatherly *v.* Eatherly, 1 Cold., 461; Freeman *v.* Freeman, 8 Vin. Abr., Tit. Devise, 51; Sessoms *v.* Sessoms, 2 Dev. & B., 453; Perry on Trusts, Sec. 724; Key *v.* Key, 4 Deg. M. & G., 73; Pearsoll *v.* Simpson, 15 Ves., 29.

The opinion in the last-cited case is referred to, approved and followed by this Court in Robinson *v.* Portland Orphan Asylum, 123 U. S., at p. 702, a case, also, bearing a close analogy in principle to the case at bar. In it a testator, after a provision in favor of his wife for life, provided that, if his sisters should survive his wife, they should have the income of his estate as long as they lived, the estate at their death to be divided into three parts, one for each of three charitable institutions. The sisters did not survive the wife, and it was claimed that the testator died intestate except as to the provision for the wife. This court, after citing and quoting from Metcalf *v.* Framingham Parish, *infra*, held there was a plain intention on the part of the testator to give to his widow the estate in question for her life only, not to die intestate as to any portion of it, and to limit the contingency of the gift to his sisters, only.

The court said, further: "It is true that the ultimate gift to the defendant is described as 'commencing at their death,' that is, at the death of Ann Smith and Eleanor

Cummings Robison, but that language is evidently used only as indicating the expectation of the testator, which he would naturally indulge, that the beneficiaries named would live to receive the gift intended." So, in the present case, it was even a more natural expectation on the part of the testatrix, either that she would survive her son or that her son would survive her, to receive the gift intended; and the intent is quite as plain as in the case referred to, that, if the event did not happen, the testatrix desired her property to pass to the charity specified in her will. That she intended "not to die intestate as to any portion of the estate," is equally unquestionable.

Among many other authorities stating the principle may be cited Smith *v.* Bell, 6 Pet., 68, 80; Patch *v.* White, 117 U. S., 210; Newell *v.* Nichols, *supra, et passim.*

An authority apparently in opposition to this view is cited in the brief on behalf of the appellants, Faul and Waesner, namely, the case of Gibson *v.* Seymour, 102 Ind., 485. There a wife executed a will devising her property to her husband for life, with a proviso that, if he should survive her, it should go at his death to her step-daughter. The husband dying in the lifetime of the testatrix, it was held that the court could not, by mere presumption, eliminate from the will the contingency which the testatrix had expressly annexed to it. The testatrix had not in that case, as in this, manifested an intention not to die intestate as to any portion of her estate, and doubtless contemplated the making of a new will in case she outlived her husband, the case being thus quite different from the one at bar. The court based its decision, in terms, upon the proposition that "to strike out the provision creating the contingency would make the will express a meaning entirely different from what its framer intended".

This case, therefore, would seem to be distinguishable in

its facts and in its circumstances from the case now under consideration, and to fall under the observations of this Court in Robinson *v.* Portland Orphan Asylum, *supra*, viz: "But little aid, however, in such cases is to be derived from a resort to formal rules, or a consideration of judicial determinations in other cases apparently similar. It is a question in each case of the reasonable interpretation of the words of the particular will, with the view of ascertaining through their meaning the testator's intention." If Gibson *v.* Seymour is not thus distinguishable in its facts and circumstances from the case at bar, then it is irreconcilable with Robinson *v.* Portland Orphan Asylum, and must yield to the higher authority of this court. It is also opposed by Aulick *v.* Wallace, *supra*.

The court is bound to give that construction which will effectuate the intention, if such intention can be gathered from the terms of the will itself; and the intention is to be gathered from everything contained within the four corners of the instrument. *In re* Swenson's Estate, 55 Minn., 300.

In re Swenson's Estate, it is also said that, in ascertaining the intention of the testator, the court is authorized to put itself in the position occupied by him at the time the will was executed, and, taking in view the then existing circumstances, to discover, from that standpoint, what was intended by the testator when using the language demanding construction. 55 Minn., pp. 308–9; Yates *v.* Shern, 84 Minn., 165.

Applying this sensible, and indeed this only fair and reasonable rule of construction to the will now in dispute, is there room for doubt or controversy that the construction given it by the Supreme Court of the District of Columbia is the correct one? Can the court place itself in the position occupied by the testatrix at the time the will was executed, and, construing it from that standpoint, doubt that

the substantial meaning and intent of the testatrix was that, unless her husband or son should survive her, all her property should pass to the Home? One method of stating that intent, from her standpoint at the time the will was made, would have been to say, as she has done, "In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son Eugene Rhodes, I give and bequeath all my property to the Young Women's Christian Home." Another method of stating the same intent would have been to say, "If neither my husband nor my son should survive me, I give and bequeath my property to the Home." It is impossible to say, looking at the will from her standpoint at the time, not that what she would have intended if she had conjectured the fate which actually befell her son and herself, but that what she actually intended, would have been any better expressed by one of these forms of expression than by the other. It is only by imputing to the former one, the one actually used, a narrow not to say a cavilling literalness which no one, gathering her intention "from everything contained within the four corners of the instrument", can for a moment consider to have been intended by her, that the claims of the Home can be rejected.

As this court has said in Robinson *v.* Portland Orphan Asylum, the only question is one "of the reasonable interpretation of the words of the particular will, with the view of ascertaining through their meaning the testator's intention." And this court, in the case cited, further quotes with approval the language of the Supreme Judicial Court of Massachusetts in the case of Metcalf *v.* Framingham Parish, 128 Mass., 370, 374, as follows:

> "The decision of this question doubtless depends upon the intention of the testator, as manifested by the words he has used, and an omission to express his in-

> tention cannot be supplied by conjecture. But if a reading of the whole will produce a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared."

In the case last cited, thus approved by this court, the testator had left a fund for the benefit of his wife's sister and her husband, the net income to be paid to her during her life if she died before her husband, one-half of the principal to go to a charitable institution and the income of the other half to be paid to the husband for life, while, if he died before her, then at her death the whole principal to be transferred to the charity—no disposition being, in terms, made of the one-half to be set aside for the husband's benefit, and after the termination of that trust. *Held*, upon the principles above stated, that the principal of this latter half, by implication, passed to the charity, as being evidently within the intent and meaning of the testator, though not in terms expressed.

The application to the present case of the principles established by these authorities is plain. No one can read Mrs. Rhodes' will without recognizing, beyond the possibility of a doubt, that she intended to dispose of the whole of her estate, and that, unless her son lived, in the language of this court in 123 U. S., p. 709, "to receive the gift intended", she purposed that it should pass to the Young Women's Christian Home. There is no room for question or dispute over these propositions; the only controversy possible is, whether the language employed to carry out this unmistakable intention is to be construed with a critical literalness which shall defeat it, or whether "the intention is to be car-

ried into effect, where apparent, although expressions must be discarded or modified to effectuate that purpose" (Town *v.* Wentworth, *supra*); whether, in words of Lord Mansfield, "implication shall supply verbal omissions, the letter shall give way, every inaccuracy of grammar, every impropriety of terms, shall be corrected by the general meaning, if that be clear and manifest" (Chapman *v.* Brown, *supra*); whether the construction of the will shall be made "to depend much more upon the evident intent of the testator than upon the strict import of any term that he may make use of" (Lambert's Lessee *v.* Paine, *supra*); whether the clearly perceived intent "must prevail, although in giving effect to it some words should be rejected or so restrained in their application as to change their literal meaning in the particular instance" (Finley *v.* King's Lessee, 3 Pet., p. 377), etc.

Both in the opinion of the Court of Appeals and in the brief on behalf of the next of kin of testatrix, it is urged that, although words will be rejected and words supplied to effectuate an intent which the will discloses, clauses cannot be supplied, transposed or intrepreted to meet contingencies which it may be believed the testator would have provided for if his attention had been called to them, but for which he has not in fact provided. The cases supporting this proposition are, it is believed, without exception cases turning, not as in the present case upon what the testator intended by the provision made, looking at his language from his standpoint at the time he made it, but upon what it is contended he would have done had his attention been called to contingencies differing in substance from any he in fact contemplated, and for which contingencies concededly he has not in fact meant to provide. A gift to A provided both the testator's children should die before the dates at which they were respectively to receive their shares of the

estate, unaccompanied by any remainder to A if one child should die before and the other shortly after those dates, as actually happened (Illinois Land Co. *v.* Bonner, 75 Ill., 315, 326–7); a remainder to a step-daughter in case the husband of the testatrix survived the latter, with no provision for her if the testatrix survived the husband (Gibson *v.* Seymour, 102 Ind., 485); a provision that, if further issue should be born to a daughter, all the testator's real estate should be equally divided among all present and future children of the daughter; but making no provision for division among the present if there should be no such further issue (Rupp *v.* Eberly, 79 Pa. St., 141) are examples of the authorities in question. Assuming for the present that they were correctly decided, or that they represent the weight of authority, their want of analogy to the case now before the court is plain. In each of them, looking at the will from the testator's stand-point at the time of its execution, that he failed through oversight to provide for a state of facts substantially different from those specified in his will, and that but for such oversight he would have provided for them, and in a particular way, was matter of pure inference. In the case at bar, looking at the will from the stand-point of the testatrix at the time of its execution, there is no state of facts differing in any substantial or material particular from those which the instrument shows she did contemplate, and no doubt at all that the will manifests her wish and intention as to the disposition to be made of her property under them.

The foregoing considerations and authorities, it is believed, are sufficient to justify the decision of the Supreme Court of Columbia, as correctly determining the intention of the testatrix in the case of this particular instrument, as gathered from its "four corners". It is desirable, however, if it be practicable, to arrive at some general principle which may

fairly and satisfactorily settle the long mooted difficulties to which such tragedies are supposed to give rise; and it is believed that such a principle is already established in the practical result of the cases upon the subject.

"The law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England, which is exclusive of positive law, enacted by statute, depends upon principles." Lord Mansfield in Jones *v.* Randall, Cowp. 39.

(b.)

In the second place, then, we beg to submit, as the result of all the authorities upon the subject, and as the rule or principle which is to be deduced from them, that, in so far as the disposition of the estate of any person so dying is concerned, such person is to be considered as having been the survivor.

With the single exception of the case reported as Underwood *v.* Wing and Wing *v.* Angrave, the authorities, English and American, are entirely harmonious in their result, and the unsatisfactory state of the question under consideration appears to have arisen, not from any variant rulings by the courts, but from the fact that, in their opinions, they have stopped short of the formulation of any principle to which they can be referred. The courts, repudiating presumptions from age, sex, health, and similar circumstances, have simply declared that the estates of persons so dying shall descend and be distributed as if their deaths had occurred at the same moment, apparently overlooking or else ignoring the fact that neither the statute of distributions nor that of descents contains any provision governing

the descent or distribution of estates of persons dying at the same moment. As pointed out in the former portion of this brief, however, in all the reported cases of intestacy, the courts have, in fact, disposed of the estate of each person dying under such circumstances as if he were the survivor; and in every case of testacy except the Underwood case the same practical result has been administered.

As to the Underwood case, the result is very curious. The court adopts and emphasizes the formulary above referred to, namely, that the property of persons dying under such circumstances is to be disposed of as though they had died at the same moment, but without formulating any rule or principle which should govern in such cases. The will of Mr. Underwood having provided that, if he survived his wife and children, his estate should pass to Wing, and the will of the wife having provided that, if she survived her husband and children, her estate should pass to Wing, the court held that, for the purpose of giving effect to the will, the husband was not to be supposed to have survived the wife, nor the wife to have survived the husband; but, the will having been thus, in effect, abrogated, the court declared the heirs and next of kin of Mr. Underwood to be entitled to his property, as though he had been survivor, and that the heirs and next of kin of Mrs. Underwood were to take her property, as though she had been the survivor. In short, the property of neither Mr. Underwood nor of his wife was to pass as though they were, respectively, to be taken as the survivors *quoad* their own estates, in so far as their wills were concerned, but each was taken to have been the survivor, *quoad* his or her estate, in favor of their respective heirs and next of kin. That this result defeated the intent of the respective testators has very generally been conceded, and is not seriously controverted in the majority

opinions; and that it involved an illogical inconsistency in the particular above pointed out would seem to be evident. The case is in harmony in its results with every other decision upon the subject, English and American, in distributing the estates of persons perishing in a common disaster, as though each were, as to his own estate, the survivor, except that it denies to devisees or legatees under a will the benefit of that rule.

We submit that there is no reason or principle upon which any distinction between the beneficiaries under a will on the one hand, and the person next entitled under the law in cases of intestacy on the other, can be established. In the absence of evidence that her son survived her, the property of the testatrix is, under the *principle* of all the authorities, to be disposed of as though she were the survivor; and her will declares plainly her wish and intent with respect to her property in that event.

IV.

A further proposition, discussed in the brief on behalf of appellants Faul and Waesner, is believed scarcely to require comment here. This proposition is that the decree of the Supreme Court of the District of Columbia was erroneous, because it awarded to appellant all the property of Mrs. Rhodes; to which the brief objects that there is real estate in Kansas and Colorado which was not within the jurisdiction of the court below, and with respect to which there are parties in interest who were not before the court.

It is well settled that a decree or judgment will not be reversed for immaterial error; so that, if the record in this case showed the existence of any such real estate as is referred to in the brief, it would be a sufficient answer to say

that the interests of any persons who were not parties to the suit below would not be affected by the decree, and that it does not lie in the mouths of persons who *are* bound, to raise objections on behalf of persons who are not, and whom they do not represent. In the second place, there is no evidence in the record, or elsewhere, of which the court can take notice, that Mrs. Rhodes died seized or possessed of any any property which was not within the jurisdiction of the court below, or that there are any persons interested in any portion of her estate who were not parties to this cause. If there is such real property, no decision of any courts than those of the jurisdiction in which it is situated could affect it. Readman *v.* Ferguson, 13 D. C. App., 60, 64.

It is respectfully submitted as follows:

1. That the decree of the Court of Appeals of the District of Columbia, resting upon the theory that, where two persons perish in a common disaster, one of whom was the beneficiary under the will of the other, the will *prima facie* divests the testator's title and vests it in the legatee, was erroneous.

2. That, under the principles of construction governing wills, and especially the principle which subordinates the letter to the plain intention, to be gathered from the testator's standpoint and from the four corners of the instrument, the Young Women's Christian Home is the party intended by the will of Mrs. Rhodes, under the circumstances which have occurred, to receive her estate.

3. That the principle deducible from the authorities upon the subject is that, under the English law, the estate of each person so dying is to be administered as though he, as to that estate, was the survivor, and that the estate of Mrs. Rhodes is accordingly to be so administered.

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4. That the decree of the Court of Appeals of the District of Columbia should be reversed, and the decree of the Supreme Court of the District of Columbia reinstated.

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